



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Chemical Workers Union Council
UFCW, Local 1046C

Petitioner

v.

Merrimack County Nursing Home
and County of Merrimack

Respondent

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Case No. M-0738-9

Decision No. 2005-093

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The International Chemical Workers Union Council of the United Food and Commercial Workers, Local 1046C (the "Union") filed an improper practice charge on May 12, 2005 against the Merrimack County Nursing Home and County of Merrimack (the "County") alleging violations of RSA 273-A I (a), (e), (g), (h) and (i) generally related to the County's refusal to comply with an arbitration award ordering the reinstatement of Melissa Foote to her former position. More specifically, the Union alleges that on or about November 13, 2002, Ms. Foote was terminated by the County from her position as a certified nursing assistant ("CAN") at the County's nursing home for allegedly neglecting and verbally abusing a resident of the nursing home. The Union states that a grievance was filed on her behalf in accordance with the contractual grievance procedure and that said grievance was pursued to final and binding arbitration, as provided therein. As described in the complaint, on or about December 8, 2004, the arbitrator issued his opinion and award, wherein he determined, among other things, that "there was not just cause for the County to terminate Melissa Foote under the collective bargaining agreement." As remedies, the arbitrator ordered that she be reinstated to her former position without back pay or other contract benefits, provided that she takes an anger management course and any neglect and abuse training programs the Nursing Home deems appropriate. In reference to the award, the Union asserts that the arbitrator rejected the County's specific position that an order of reinstatement was precluded by public policy.

The Union alleges that since the issuance of the arbitrator's award, the County has not only refused to comply with its terms, but has also taken actions to further undermine and prevent Ms. Foote's reinstatement. The Union contends that the County in either November or December 2004

contacted Robert Ehlers (and/or other persons) at the New Hampshire Department of Health and Human Services ("HHS") in order to insure that Ms. Foote was placed on the licensed nursing assistant registry as having been found to have committed neglect and abuse of a resident of the nursing home, and therefore disqualify her from being employed as an LNA/CNA by the County. As referenced in the Union's charge, Ms. Foote was notified by letter dated December 17, 2004 that HHS had made findings of neglect and abuse by her of a nursing home resident and that she had a right to a hearing to dispute the findings. Despite the fact that she had yet to be provided a hearing, the Union indicates that her name was placed on the disqualifying registry on some unknown date following the December 17, 2004 letter. Following a hearing conducted by the Administrative Appeals Unit of HHS, in which the County sought and was allowed to participate as an intervener, the Union states that the presiding officer, on or about April 14, 2005, ordered that Ms. Foote's name be removed from the disqualifying registry pending her appeal. The Union alleges that in this regard the County has continuously and consistently engaged in actions to undermine the enforceability of the award.

The Union states that it has repeatedly sought information from the County relative to the December 17, 2004 letter from HHS and any actions taken by it to have Ms. Foote placed on the disqualifying list. Other than indicating that it would not abide by the award because of public policy reasons, the Union alleges that the County has failed and refused to provide any other reason for its failure to comply and continues to refuse to provide information requested by the Union. Accordingly, the Union claims that the County has refused and failed to bargain in good faith by failing to comply with a final and binding arbitration award, by its continued re-assertion of the "public policy" defense despite the arbitrator's rejection of said argument, and by its continued intervention in the HHS proceedings in an attempt to re-litigate the arbitration, in violation of RSA 273-A I (a), (b), (e), (g), (h) and (i). By its continued refusal to provide information to the Union which is relevant and necessary in the Union's attempt to ascertain whether the County has subjected Ms. Foote to disparate treatment, the Union alleges the County has violated RSA 273-A I (a), (b) and (e). The Union further alleges that based upon Ms. Foote's status as a Union shop steward, member of the Union's negotiating team, and/or because "she was aggressive in acting as an agent for the Union," the County has discriminated against her in violation of RSA 273-A I (a), (b), (c), (e), (g), and (h). As remedies, the Union requests, inter alia, that the PELRB order the County to (1) immediately reinstate her to her position, (2) make her whole for all back pay and benefits, (3) provide the Union with the information it has requested, and (4) issue an interim order requiring the County to reinstate Ms. Foote and cease and desist from asserting that Ms. Foote neglected the resident in the HHS proceedings.

The County filed its Answer, Counterclaim, and Motion to Strike on June 10, 2005. The County specifically denies that it has committed an unfair labor practice as alleged in the Union's complaint, or that it is in violation of RSA 273-A:5 or any other section of RSA 273-A. The County admits that the parties proceeded to arbitration on Ms. Foote's termination grievance and that the Arbitrator did not sustain the County's neglect charges against Ms. Foote. However, the County points out that the arbitrator expressly found that she had been inattentive and unprofessional in caring for the resident and did, in fact, engage in verbal abuse. Notwithstanding the finding of verbal abuse, the County admits that the arbitrator did order her reinstatement despite the County's expressed position that such an order would violate public policy. The County denies the Union's allegation that it contacted HHS in either November or December 2004 in order to insure that Ms. Foote's name was placed on the disqualifying registry. Further answering, the County admits that it followed up on statements made at a public conference by an HHS official regarding the establishment of the registry, and that it made inquiries about the registry in or about November

2004, prior to the issuance of the arbitrator's award. The County is informed and believes that the HHS did prematurely place the abuse and neglect findings on the LNA registry. While the County admits that it is an intervener in Foote's appeal now pending before the HHS, it otherwise denies that it is re-litigating the matter before the arbitrator or that it is attempting to prevent Ms. Foote from having an evidentiary hearing provided for by federal or state law.

As to its alleged non-compliance with the arbitrator's award, the County submits that its contractual obligations do not require it to act in a fashion in violation of clearly established public policy and/or its statutory obligations. The County admits that it has advised the Union that reinstatement of Ms. Foote to employment would violate well-established public policy which makes clear that a long term care facility shall not employ any persons who have been found to have engaged in abuse and neglect. As to the Union's information requests, the County answers that the Union has made numerous, burdensome, onerous and vexatious requests for certain documents which were not relevant or reasonably necessary to its representation of Foote in the already concluded arbitration proceedings. Answering further, it states that such requests included documents that were either non-existent, privileged or already provided to the Union.

In summary, the County asserts that the Union is barred by the CBA and well-established public policy and law from seeking implementation of the arbitrator's award, and that the award is void and unenforceable as contrary to public policy and the provisions of the CBA. It further states that the Union's allegations as to the County's discrimination against Ms. Foote because of her union activities are untimely and barred by the doctrines of collateral estoppel and *res judicata*. Accordingly, the County requests that the PELRB dismiss the Union's improper practice charge as failing to state a claim under RSA 273-A and deny its prayers for relief as lacking substance on the merits and without a proper basis in law or fact. In this regard, in its Counterclaim, the County alleges that by insisting that the County implement an award that is void and unenforceable as a matter of law and public policy, the Union has failed to bargain in good faith in violation of RSA 273-A:5 II (d). Additionally, by insisting that the County implement an award that does not comport with the provisions Article 25 of the parties' CBA, the County alleges that the Union has repudiated the CBA and failed to bargain in good faith in violation of RSA 273-A:5 II (f). The County therefore requests, among other things, that the PELRB direct the Union to cease and desist in its insistence that the County implement the arbitrator's award issued on December 8, 2004.

In its Motion to Strike, the County submits that certain allegations contained within the Union's improper practice charge are irrelevant, outside the scope of the jurisdiction of the PELRB to review, and potentially prejudicial. Said allegations, include, but are not limited to, those relating to the HHS proceedings and Union counsel's participation in same. On June 20, 2005, the County filed a Motion for Hearing on Motion to Strike.

On June 24, 2005 the Union filed its Answer and Response to the Merrimack County Nursing Home's Counterclaim, Memorandum in Opposition to Merrimack County Nursing Home's Motion to Strike, and Opposition to Motion to Conduct Oral Argument on the Motion to Strike. The Union denies that it has committed an improper labor practice as alleged in the counterclaim or that it is in violation of RSA 273-A:5 II (d) or (f), or any other section of RSA 273-A. The Union asserts, *inter alia*, that the County has failed to properly perfect its bringing of an improper labor practice against the Union in accordance with PELRB procedures and failed to pay the filing fee for such a charge. It submits that the County is barred by its own "unclean hands" from claiming that the Union has failed to bargain in good faith. The Union states that by reason of its duty of fair representation, it is required to attempt to enforce and obtain compliance of the award, in whole or in part, including the

reinstatement remedy, unless and until said award is found to be void and unenforceable. Furthermore, the Union contends that neither the arbitrator, HHS or any of its subdivisions or departments, has found that Ms. Foote committed "abuse" as that term is defined under 42 C.F.R. Section 488.301, so that there was no public policy reason for the County to refuse to comply with the award in December 2004 or thereafter.

The Union objects on numerous grounds to the County's Motion to Strike as articulated in its memorandum in opposition, including, but not limited to, the factual allegations in its complaint being directly relevant to the unfair labor practice charges it has alleged against the County. The Union opposes the County's Motion to Conduct Oral Argument on the Motion to Strike based upon its contention, *inter alia*, that there are no credibility issues that need to be resolved in order for the PELRB to decide the County's Motion to Strike.

A telephonic pre-hearing conference was conducted on June 27, 2005 by the undersigned hearing officer.

PARTICIPATING REPRESENTATIVES

For the Union: Randall Vehar, Esq.

For the County: Warren Atlas, Esquire

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Whether the County has violated RSA 273-A:5 I (a), (e), (g), (h) and/or (i) by refusing to comply with the arbitrator's award and re-employ Melissa Gail Foote as an LNA.

If so, what shall be the remedy?

- (2) Whether the County has taken certain actions to undermine the final and binding nature of the Arbitrator's award, including its refusal to timely reinstate Ms. Foote and thereby interfere with her ability to have her CAN/LNA license renewed and pursue future job prospects, in violation of RSA 273-A:5 I (a), (e), (g), (h) and/or (i).

If so, what shall be the remedy?

- (3) Whether the Union's claim of anti-union discrimination is timely filed, or otherwise barred by the doctrines of collateral estoppel and *res judicata*.

If not, whether the County has failed and refused to reinstate Ms. Foote because she was a Union shop steward and/or a member of the Union's negotiating team and/or an aggressive agent for the Union, in violation of RSA 273-A:5 I (a), (b), (c), (e), (g), and/or (h).

If so, what shall be the remedy?

- (4) Whether the County has failed and/or refused to provide information to the Union that is relevant to the Union's obligation to fairly represent Ms. Foote and to insure

the County's compliance with the arbitrator's award in violation of RSA 273-A:5 I (a), (b) and (e).

If so, what shall be the remedy?

- (5) Whether the Union has violated RSA 273-A:5 II (d), (f) and/or (g) by insisting on implementation of an arbitration award that violates public policy.

If so, what shall be the remedy?

WITNESSES

For the Union:

- (1) Melissa Foote
- (2) Shari Tinkham, Local President
- (3) Robert Chase
- (4) Laurie Engdahl, Esq.
- (5) Robert Ehlers
- (6) Robert Foote
- (7) Cindy Freeman
- (8) Lori Brown

For the County:

- (1) Robert M. Chase, Administrator
- (2) Lori Brown, Assistant Administrator

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. Collective Bargaining Agreement (1999-2002)
2. Arbitration Opinion and Award, dated December 8, 2004

For the Union:

1. Arbitration hearing exhibits from discharge arbitration of Melissa Foote:
Joint Exhibit – 2, November 13, 2002, Termination Letter to Melissa Foote

Joint Exhibit – 3, February 11, 2003, Termination Letter to Melissa Foote
 Joint Exhibit – 4, November 23, 2002 Grievance No. 03-1 w/employer response
 Joint Exhibit – 5, November 25, 2002, Robert M. Chase letter to Melissa Foote
 Joint Exhibit – 6, Feb. 17, 2003, S.Tinkham letter to Merrimack Cty. Comm.
 Joint Exhibit - 7A, CNA/LNA Floor Sheet
 Joint Exhibit - 7B, Patient Care Plan
 Joint Exhibit - 7C, CNA/LNA Assignments
 Joint Exhibit – 8, Union Request for Personnel Files/Disc. Narrative
 Employer Exhibit – 1, 5/19/00 S. Tinkham letter to Thomas P. Matzke
 Employer Exhibit – 2, Licensed Nursing Assistant Job Description
 Employer Exhibit – 3, State of New Hampshire Resident's Bill of Rights
 Employer Exhibit – 4, Nursing Home Abuse and Neglect Policy
 Employer Exhibit – 5, Amy Haddock Handwritten Statement
 Employer Exhibit – 6, Bobbi Jo Hodge Handwritten Statement
 Employer Exhibit – 7, "Welcome" packet
 Employer Exhibit – 8, Inservice Attendance dated 12/09/2003
 Employer Exhibit – 9, October 28, 2002, Complaint/Concern Form
 Employer Exhibit – 10, Oct. 28, 2002, Faith Flint Typed, Unsigned Statement
 Employer Exhibit – 11, Undated Typed Linda Paddock Statement
 Employer Exhibit - 12A, October 28, 2002, Daily Staffing
 Employer Exhibit - 12B, Inservice, Page 2
 Employer Exhibit - 12C, Inservice, Page 4
 Employer Exhibit - 12D, Inservice, Page 1
 Employer Exhibit - 12E, Punch Detail, 10/02/02-11/05/02 for Shelley Hough
 Employer Exhibit – 13, October 30, 2002, Melissa Foote Typed Statement
 Employer Exhibit – 14, Memo to File Re: 11/08/02 Telephone Conversation
 Employer Exhibit – 15, 11/10/02 Letter from M. Foote to Mr. Chase
 Employer Exhibit – 16, 11/11/02 Letter from M.Foote to Mr. Chase
 Employer Exhibit – 17, Investigation Summary
 Employer Exhibit – 18, 3/6/02 Letter from R. Chase to L. Trembley
 Employer Exhibit – 19, 9/19/01 Letter from R. Chase to L. Trembley
 Employer Exhibit – 20, Protective Investigation Summary Intake ID 14929,
 Rept. 6385 (redacted)
 Employer Exhibit – 21, Protective Investigation Summary Intake ID 14929,
 Rept. 6385 (redacted)
 Union Exhibit – 1 11/1/02 Employer-typed Summary of Meeting w/M. Foote
 Union Exhibit – 2 11/7/02 Employer-typed Summary of Meeting w/M. Foote
 Union Exhibit – 3 9/19/01, Letter from R. Chase to L. Trembley
 Union Exhibit – 4 3/4/02 Letter from R. Chase to L. Trembley
 Union Exhibit – 5 Cindy Freeman Evaluation of Melissa Foote
 Union Exhibit – 6 April 16, 2001, Social Worker Petition
 Union Exhibit – 7 10/16/02 Complaint/Concern Form Regarding Bobbi Jo
 filed by Sabrena Clark

2. Letter from Lori Brown to Lee Leppanen, NH Board of Nursing (with Complaint Form) dated November 17, 2002.

3. Brief on behalf of Merrimack County Nursing Home dated September 2, 2004, to Arbitrator Cochran.
4. Union's Post Hearing Brief dated September 3, 2004, to Arbitrator Cochran.
5. Arbitrator Cochran's Opinion and Award ordering reinstatement of Melissa Foote. (See Joint Exhibit 2, above).
6. Letter to Melissa Foote dated December 17, 2004, from Robert K. Ehlers, Bureau Chief - Certification, Bureau of Health Facilities Administration, New Hampshire Department of Health and Human Services.
7. E-mail from Randy Vehar to Attorney Laurie Engdahl dated December 17, 2004.
8. E-mail from Randy Vehar to Attorneys Warren Atlas and Laurie Engdahl dated January 4, 2005. (Information requests).
9. E-mail from Randy Vehar to Arbitrator Cochran dated January 5, 2005.
10. E-mail from Warren Atlas to Randy Vehar dated January 6, 2005.
11. E-mail from Randy Vehar to Warren Atlas dated January 6, 2005.
12. E-mail from Arbitrator Cochran to Attorneys Vehar and Atlas dated January 6, 2005.
13. E-mail from Randy Vehar to Arbitrator Cochran dated January 6, 2005.
14. E-mail from Laurie W. Engdahl to Arbitrator Cochran and Randy Vehar dated January 7, 2005.
15. E-mail from Randy Vehar to Arbitrator Cochran dated January 7, 2005.
16. E-mail from Randy Vehar to Arbitrator Cochran dated January 10, 2005.
17. E-mail from Arbitrator Cochran to Attorneys Vehar and Atlas dated January 10, 2005.
18. Letter from Attorney Warren Atlas to Arbitrator Cochran dated January 12, 2005.
19. E-mail from Randy Vehar to Attorneys Warren Atlas and Laurie Engdahl dated January 13, 2005. (Information requests).
20. E-mail from Warren Atlas to Randy Vehar dated January 14, 2005.
21. E-mail from Randy Vehar to Warren Atlas dated January 18, 2005.

22. Letter from Randall Vehar to John Martin with copy to Warren Atlas dated February 14, 2005.
23. Letter from Warren D. Atlas to Randall Vehar dated March 3, 2005 (Refusing to provide information).
24. E-mail from Randy Vehar to Arbitrator Cochran and Warren Atlas dated March 3, 2005.
25. E-mail from Randy Vehar to Warren Atlas and Laurie Engdahl dated March 14, 2005 (1:31 p.m.) (Information request).
26. E-mail from Randy Vehar to Warren Atlas and Laurie Engdahl dated March 14, 2005 (2:36 p.m.) (Information request).
27. New Hampshire Department of Health and Human Services "Response to Request for Information" dated April 13, 2005.
28. Order Removing Reports of Abuse and Neglect by Appellant from Nurse Aide Registry while appeal is pending dated April 14, 2005.
29. E-mail and letter from Randall Vehar to Warren Atlas dated April 18, 2005. (Reiterated demand to reinstate Foote).
30. Notice of Removal From Nurse Aide Registry dated April 20, 2005.
31. E-mail from Randy Vehar to Arbitrator Cochran dated April 28, 2005.
32. Letter from Warren Atlas to Randall Vehar dated April 29, 2005.
33. Letter from Warren Atlas to Arbitrator Cochran dated April 29, 2005.
34. Letter from Warren Atlas to Randy Vehar dated April 29, 2005.
35. Letter from Arbitrator Cochran to Attorneys Vehar and Atlas dated May 2, 2005, with Fax cover sheet dated May 3, 2003.
36. Letter from Randy Vehar to Arbitrator Cochran dated May 3, 2005.
37. E-mail from Randy Vehar to Arbitrator Cochran dated May 13, 2005.
38. E-mail from Warren Atlas to Arbitrator Cochran dated May 17, 2005.

39. Foote LNA licence expiring June 18,2005.
40. Filings before the Administrative Appeals Unit (AAU) of the New Hampshire Department of Health and Human Services:
- (1) Merrimack Nursing Home's "Motion to Intervene" filed with AAU on or January 29, 2005.
 - (2) February 14, 2005, Ruling Granting Motion to Intervene by AAU
 - (3) "Melissa Foote's Memorandum of Law Relative to the Scope of Issues on Appeal and the Legal Standard to be Applied" ("Foote Legal Memorandum") filed on March 11,2005.
 - (4) Affidavit of Melissa Foote filed March 11,2005, with AAU (Paragraph 17 authenticates Exhibit Q, the public records request that resulted in Foote's Motion to Compel Discovery)(Affidavit was filed with AAU on March 11, 2005, with Foote's Legal Memorandum of Law).
 - (5) Affidavit of Randall Vehar (Affidavit was filed with AAU on March 11, 2005, as part of Foote Memorandum of Law).
 - (6) Merrimack County Nursing Home's "Pre-Hearing Memorandum of Law" filed on or about March 11,2005.
 - (7) State of New Hampshire HHS "Memorandum of Law" filed on or about March 11, 2005.
 - (8) Foote's "Motion for Discovery" filed with AAU on or about March 16, 2005.
 - (9) "Melissa Foote's Response to the Merrimack County Nursing Home's Pre-Hearing Memorandum of Law" filed on or about March 19,2005.
 - (10) "Melissa Foote's Response to Department of Health and Human Services' Memorandum of Law" filed on or about March 19,2005.
 - (11) "Merrimack County Nursing Home's Response to Melissa Foote's Memorandum of Law Relative to the Scope of Issues on Appeal and the Legal Standard to be Applied" filed on or about March 21,2005.
 - (12) Melissa Foote's "Motion for Summary Judgment" filed on March 25,2005.
 - (13) Second (Corrected) Affidavit of Randall Vehar filed on March 25,2005.

- (14) "Merrimack County Nursing Home's Opposition to Appellant Melissa Foote's Motion for Discovery" filed with AAU on or about March 26, 2005.
 - (15) "Merrimack County Nursing Home's Opposition to Appellant Melissa Foote's Motion for Summary Judgment" filed on or about April 4, 2005.
 - (16) "Notice of Filing Second Affidavit of Melissa Foote" (with affidavit attached) dated April 12, 2005.
41. Bob Chase's "Recommendation for Termination" of Melissa Foote to County Commissioners dated November 12, 2002.
 42. Other Documents that will be subpoenaed from Respondent for hearing that Respondent has refused to produce despite public records request.

For the County:

1. Protective Investigation Summary of Paula Patten, 2/26/03
2. Protective Investigation Summary of Paula Patten, 3/03/03

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time set aside for this hearing will be one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least five (5) days prior to the date of the evidentiary hearing.

DECISION

1. The parties' counsel shall meet, or otherwise confer, on or before **July 19, 2005**, in order to exchange all pertinent documents, to attempt to reach stipulations of fact and exhibits, and, if possible, to reach agreement on presenting the instant case by written submission, or, in the alternative, without the need for testimonial evidence. In the event that agreement is reached to submit the case, or any portion thereof, solely by written submission, the parties shall forthwith file a joint statement indicating such agreement and shall include therein a proposed schedule for filings.
2. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB at the time written submissions are filed, or least five (5) days prior to the date of the hearing, as the case may be.
3. A supplemental pre-hearing conference will be conducted by the undersigned hearing officer, via telephone, with the parties' counsel on:

July 20, 2005 @ 10:00 AM.

4. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

5. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

July 26, 2005 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire. All parties are entitled to be represented by legal counsel at their own expense.

So ordered.

Signed this 15th day of July, 2004.

/s/ Peter C. Phillips
Peter C. Phillips, Esq.
Hearing Officer

Distribution:
Randall Vehar, Esq.
Warren D. Atlas, Esq.